

Law Offices

HOLLAND & KNIGHT LLP

DOCKET FILE COPY ORIGINAL

2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202
202-955-3000
FAX 202-955-5564

New York	Orlando
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October 30, 1997

THOMAS J. HUTTON
202-828-1892

Internet Address:
thutton@hklaw.com

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

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OCT 30 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 97-182

Dear Mr. Caton:

Submitted on behalf of WLEX-TV, Inc. pursuant Section 1.415 of the Commission's Rules is an original and four copies of the "Comments of WLEX-TV, Inc." in the above-referenced proceeding.

Sincerely,



Thomas J. Hutton

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Enclosures

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**Before The
Federal Communications Commission**

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OCT 30 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)	
)	
Preemption of State and Local)	MM Docket No. 97-182
Zoning and Land Use Restrictions)	
on the Siting, Placement and)	
Construction of Broadcast Station)	
Transmission Facilities)	

To: The Commission

COMMENTS OF WLEX-TV, INC.

WLEX-TV, Inc., the licensee of WLEX-TV, Lexington, Kentucky, hereby comments in support of the proposed rule published by the Commission in its Notice of Proposed Rulemaking in this docket.¹ As the Commission has acknowledged, the implementation of digital television ("DTV") will require construction of new communications towers, modification of existing communications towers and displacement of existing communications licensees across the country. WLEX-TV acknowledges the important role of state and local governments in regulating such construction activities, but the proposed rule would not restrict that role unnecessarily. Rather, the proposed rule will provide a necessary framework setting forth timetables for decisions, offer a process for resolving disputes on a timely basis, and introduce preemptive limitations only as needed to eliminate unreasonable restrictions on tower proposals at the state or local level.

¹ 62 Fed. Reg. 46241 (Sep. 2, 1997).

1. Background.

WLEX-TV is an NBC network affiliate operating on Channel 18 in Lexington, Kentucky. The station has been assigned DTV channel 20 in the FCC's DTV Table of Allotments. WLEX-TV is required to apply for a DTV permit for the new channel on or before November 1, 1999 and to construct the new facilities by May 1, 2002. However, firm plans cannot be made at this point because the Commission is considering numerous petitions for reconsideration of its DTV decisions and the Commission's action on those petitions could result in a different DTV allotment for WLEX-TV. WLEX-TV does know that its present tower cannot accommodate the new DTV antenna and transmission line, so WLEX-TV probably will have to build a new tower or participate in the construction of a new joint tower with other stations in the market.

2. Concerns About State and Local Review of Proposed Towers.

Tower proponents face substantial regulatory difficulties in the Lexington, Kentucky area. The state and local land use review process is lengthy, contentious and expensive. Tower proposals are often contested by local aviation interests, even when the Federal Aviation Administration ("FAA") has approved a proposed tower. In Kentucky, most tower proposals not only require local land use approval, but also approval from the Kentucky Airport Zoning Commission. Tower opponents have contested tower proposals there and in local land use proceedings on the basis of potential hazard to air safety, notwithstanding FAA approval of the tower proposal.

Likewise, in other instances around the country tower opponents have relied on such factors as potential electronic interference, radiofrequency radiation, absence of demand and other factors that go far beyond the legitimate concerns of state and local agencies responsible for land use decisions.

In many jurisdictions, tower moratoria have been put in place in response to the proliferation of antennas for mobile communications. Although the legality of those moratoria is in question in many cases, such moratoria nevertheless present an obstacle to the goal of rapid implementation of DTV service. That is why the procedural requirements of the proposed rule are so important.

3. The Proposed Rule Should Be Adopted, With Slight Modifications.

There are two distinct aspects to the proposed rule. The first is the adoption of procedural requirements designed to ensure timely review and disposition of tower proposals. WLEX-TV supports such requirements, particularly in light of the number of tower moratoria in effect in various jurisdictions. WLEX-TV and other television stations face rigorous deadlines for implementing new DTV service, and state and local approvals will be required in order to satisfy those deadlines. Clearly, protracted delays in obtaining state or local approvals will impede the implementation of DTV service. It is particularly important to note that the successful launch of DTV service will require that the service become nationally available (and therefore nationally promoted by television set manufacturers, television stations, television networks and program suppliers) around the same time, not on a fragmented basis. The adoption of the

proposed procedural requirements will advance this important national goal. WLEX-TV does note that in some cases applicable state or local law requires public notice and public hearings on tower proposals, and additional time may need to be built into the Commission's procedural deadlines where such requirements apply.

The second aspect of the proposed rule is preemption of unreasonable restrictions on tower proposals. As the Commission noted in the Notice of Proposed Rulemaking, the Commission is the sole agency with jurisdiction over issues of electronic interference. The proposed rule would codify existing law on that issue. Likewise, the Commission is the federal agency empowered to rule on the potential for hazardous radiofrequency radiation to be emitted by broadcast stations, and any state or local review of that issue should be preempted. Although it would also be appropriate to preempt local review of tower proposals based on considerations of safety of air navigation, it is not clear that the Commission, rather than the FAA, has the power to preempt such review. Nevertheless, the Commission clearly does have the more limited power specified in the proposed rule to preempt state or local review of tower lighting,

painting or marking requirements. WLEX-TV supports the proposal to preempt that aspect of state or local review of tower proposals.²

WLEX-TV proposes that the Commission add one more area of preemption. In some cases, state or local authorities have cited a lack of demand for a particular communications service as a ground for denying a tower proposal. In the case of DTV, the Commission and broadcasters are trying to foster a completely new service. At the outset, much of the new service is likely to consist of replication of existing NTSC service. Not only is there no quantifiable demand for DTV service, but there is a risk that state or local bodies will take the position that there is no need for it because it replicates an existing service. It is appropriate to preempt such action because it is directly contrary to the Commission's findings and decisions.

4. Conclusion.

WLEX-TV supports the Commission's proposal to impose procedural requirements on state and local agencies reviewing tower proposals. WLEX-TV also supports the Commission's proposal to preempt unreasonable restrictions on tower proposals at the state or local level, and suggests that the Commission add a provision

² The Commission asked in its Notice of Proposed Rulemaking whether the proposed rule should apply to all broadcast tower proposals or whether it should be more limited. Clearly, there is and will be substantial co-location between TV and FM stations, so WLEX-TV believes the rule should apply to both. AM stations do not appear to be affected by DTV implementation, so the rule could appropriately exclude AM tower proposals.

preempting any restrictions based on demand or lack of demand for a communications service to be made available from the proposed tower.

Respectfully submitted,

WLEX-TV, INC.

By: Thomas J. Hutton
Edward W. Hummers, Jr.
Thomas J. Hutton

Holland & Knight LLP
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202
(202) 955-3000
Attorneys for WLEX-TV, INC.

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